

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Part 90 of the Commission's)
Rules to Facilitate Future Development of)
SMR Systems in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030,
RM-8029

and

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

COMMENTS

C.T. Spruill (Sпруill), by his attorneys, hereby submits his Comments in the above-captioned matter. Spruill opposes the adoption of the proposals contained within the FNPRM. Insofar as Spruill's Reply Comments to the matter from which this FNPRM was derived are relevant, those Reply Comments are hereby incorporated herein, see, attached.

Sпруill would like to voice his opposition to the Commission plan to divide the country along Metropolitan Trading Area lines and auction 200 of the currently-allotted SMR frequencies to the winning bidder. It is Spruill's belief that such a

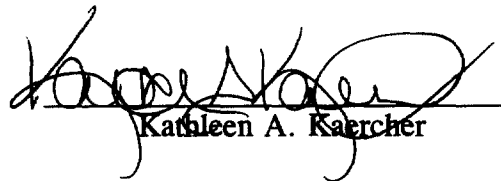
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plan is impractical and unworkable, and if attempted, would injure the already established SMR industry.

Respectfully submitted,
C.T. SPRUILL

By



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Dated: January 5, 1995

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In the Matter of)
)
Implementation of Sections 3(n) and 332)
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

REPLY COMMENTS

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SUMMARY

Nextel has been on notice as to the terms and conditions under which the Commission granted it a waiver of Rule Section 90.631, allowing five years of grace within which to construct its ESMR system. Nextel had two lawful and reasonable choices, namely, to succeed on appeal, or not to proceed with its proposed system. Since, however, Nextel did not succeed in appealing the Commission's action, and since Nextel did proceed with its proposed system, Nextel must, as a matter of law, be taken as having accepted the basis of the Commission's action.

The Commission should determine whether Nextel can solve its problem merely by changing the equipment which it will use for its ESMR system. If so, then the Commission should leave Nextel to select suitable equipment for its own use, at a burden to no one other than Nextel. The Commission must then balance the cost of requiring that Nextel return to the drawing board to design such equipment, versus demanding that the entire SMR industry adjust its operations to accommodate Nextel's mistake.

Spruill respectfully suggests that Nextel's quest for parity begin with its filing a request for rule making to establish its own allocation, thereby providing a full opportunity for comment before the Commission. One needs only to list the alternatives present to any member of the public in search of two-way service, and it is quickly apparent that ESMR is just one more alternative among many competing services, all of which appear to be doing quite nicely, except Nextel's. It is, therefore, apparent that Nextel is not in direct competition with Cellular carriers, but rather remains in direct competition with SMR operators.

The Commission's resources are sufficiently burdened at present, without the need to redefine and accommodate each service based on whether it now employs digital or analog transmissions. What Nextel wants, clearly, is to use its ESMR authorization as a weapon to preclude existing licensees from exercising the flexibility to compete with it in the ESMR field. Such blatant efforts to use the Commission's processes for anti-competitive ends should not be countenanced by the Commission.

Even where the frequency of equipment can be changed, the burden on SMR operators and their customers would be far more extensive than Nextel implied. As the Commission's records reflect, the effort would involve the disruption of the business affairs of tens of thousands of SMR customers, at a cost of hundreds of thousands of worker hours, to allow Nextel to change the frequencies of more than one million SMR end user units to other frequencies.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Sections 3(n) and 332)	GN Docket No. 93-252
of the Communications Act)	
)	
Regulatory Treatment of Mobile Services)	

To: The Commission

REPLY COMMENTS

C.T. Spruill (Spruill) hereby submits comments on reply to the above captioned rule making, to assist the Commission in making a reasoned decision in addressing the public interest. Spruill's interest in this matter is acute, since Spruill is the owner and operator of several analog SMR facilities within the State of North Carolina, serving hundreds of end users who depend on continuous service for the operation of their businesses.

In particular, Spruill takes exception to the comments filed by Nextel Communications, Inc. (Nextel), which would further retard the growth of analog SMR operations at no concurrent benefit to such operators and their end users. Indeed, enactment of the Nextel proposals would so severely cripple the ongoing businesses of these legitimate licensees as to cause a wholly anti-competitive effect. In support of Spruill's opposition to Nextel's comments, the following is shown:

The Historical Background Requires Denial Of Nextel's Suggestion

In 1990, Fleet Call, Inc., proposed the operation of an ESMRs in six ESMR Geographic Areas (EGA).¹ In elaborate detail, Nextel explained the technical protections which it required for it to provide the proposed service. The Commission explained that Fleet Call had proposed that "new co-channel systems would not be permitted in the EGA or buffer zone, however, Fleet Call considers this restriction essential to the stable RF environment that it needs to 'fine tune' and refine its system to meet changing demand," Memorandum Opinion and Order (MO&O) in File No. LMK-90036, 6 FCC Rcd. 1533 at para. 9, recon. denied, 6 FCC Rcd. 6989 (1991). With respect to what Fleet Call purported to be its bottom line technical demand, the Commission determined that

providing Fleet Call blanket protection from new co-channel licensees is not necessary to the implementation of its proposal. Our analysis shows that the current operating environment in these markets already provides Fleet Call with much of the protection it requires from new applicants. That is, the co-channel protection that is afforded all SMR licensees in these areas, including Fleet Call, essentially precludes the assignment of new stations. We therefore see no reason to place a formal restriction against new co-channel applications in Fleet Call's intended service areas,

id. at para. 17. As to existing stations, Nextel was on notice as to their presence and could fully assess their effect on Nextel's plans, and Nextel requested of the Commission no extraordinary relief from existing stations.

¹ The areas were centered on New York, Chicago, Los Angeles, San Francisco, Houston, and Miami.

At paragraph 13 of its MO&O, the Commission set the standard for its authorization of the proposed Fleet Call ESMR system with respect to existing, traditional SMR stations, stating that "we acknowledge the need to preserve for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our rules and the flexibility they too require to operate competitively and effectively." The footnote to paragraph 13 cites National Association of Business and Educational Radio, Inc. as having been among those who supported Fleet Call's "proposal on condition that other licensees in the markets retain their protection from prohibited interference and their flexibility to operate competitively," *id.* at n. 35. In the topic sentence of its Summary, the Commission observed that "Fleet Call proposes to build an ambitious private land mobile radio system that promises improved spectrum efficiency without requiring additional spectrum," *id.* at para. 36. (emphasis added) The Commission further summarized that its rules "and the degree of protection afforded its existing stations already provide Fleet Call with the protection necessary to proceed with its business plans," *id.*

From the Commission's first determination that Fleet Call could go ahead with its proposed ESMR system, Nextel, né Fleet Call, has been on notice as to the terms and conditions under which the Commission granted it a waiver of Rule Section 90.631, allowing Fleet Call five years of grace within which to construct its ESMR system. Nextel was fully aware that it was the Commission's determination that the interest of Nextel required, and the interest of the public warranted, granting Nextel

only relief from Rule Section 90.631 and that the Commission's Rules already provided Nextel with the degree of technical protection which its business plans required. Were the Commission in error in its determination, Nextel had two lawful and reasonable choices, namely, to succeed on appeal, or not to proceed with its proposed system. Since, however, Nextel did not succeed in appealing the Commission's action, and since Nextel did proceed with its proposed system, Nextel must, as a matter of law, be taken as having accepted the basis of the Commission's action and the terms and conditions on its authority which are inherent in the Commission's determination that the waiver would be sufficient for Nextel's needs, and would provide just protection for the interests of other persons.

Nextel's Problem Is Of Its Own Making

As demonstrated above, Nextel's system was conceived and authorized in accord with Nextel's own business plans and its claims of compatible operation. No technical parameters were placed on Nextel by the Commission, and Nextel was free to employ the very technology which it touted in its request for waiver. Accordingly, free from any technical imposition and unfettered by construction and loading deadlines, Nextel was able to enjoy the full fruits of its experiment.

A portion of its experiment included the use of a digital receiver which requires a broadly tuned "front-end" and intermediate frequency sections for communication with mobile transceivers employing lower power levels than traditional 800 MHz band

mobile units. This selection in system design will not be found in any order of the Commission, but it is obviously the primary source of Nextel's now admitted problems.

The broad tuning of Nextel's receivers creates an exceptional vulnerability to adjacent channel interference. The power level difference, between the average 7-watt maximum ERP for cellular-like mobile units employed for Nextel's ESMR system² and the 30-35 watt power of traditional SMR mobile units or directional control stations, creates the exact reverse of the desired-to-undesired signal ratio which the Commission has established for operation within the 800 MHz band. The Commission may further note that nothing within this explanation, which is not admitted by Nextel within its comments at page 10 of its comments, was unknown at any time prior to Nextel launching or even developing. Accordingly, the Commission must find that Nextel has purposely or foolishly placed itself in harm's way.

It is altogether possible that a receiver could be created which would remedy Nextel's problem and it could continue on its quest for SMR market dominance. The Commission must then balance the cost of requiring that Nextel return to the drawing board to design such equipment, versus demanding that the entire SMR industry adjust its operations to accommodate Nextel's mistake.

² In fact, given the increasing use of portable units for operation in association with cellular-like systems, the actual average ERP employed by subscribers may be even lower.

For example, General Electric Company has informed its regular 800 MHz band SMR customers that GE offers a digital technology which competes with the Motorola brand M.I.R.S. system and which does not suffer the same technical vulnerabilities as the Motorola system. Accordingly, the Commission should determine whether Nextel can solve its problem merely by changing the equipment which it will use for its ESMR system. If so, then the Commission should leave Nextel to select suitable equipment for its own use, at a burden to no one other than Nextel.

Parity Is Not The Issue

The basic flaw in Nextel's argument is that "the overlap of licenses on these frequencies creates operational and licensing inefficiencies for Nextel or any ESMR operator vis a vis competing CMRS providers," Nextel comments at 10. Nextel indulges in the entirely unproved assumption that its competitor is the two systems in each market which are authorized in the Domestic Public Cellular Telecommunications Radio Service. The record and the marketplace do not support this contention, and the Commission should likewise refuse to accept Nextel's underlying premise.

Nextel was afforded all of the operational authority afforded to SMR operators, with the limited exception of construction deadlines, thereby affecting the application of certain loading criteria. Despite these differences between Nextel's authority and traditional SMR facilities, the primary service offering is equal between the two. Indeed, the majority of Nextel's revenue arises out of the provision of dispatch services,

a service which Cellular operators are precluded from offering to the public. It is, therefore, apparent that Nextel is not in direct competition with Cellular carriers, but rather remains in direct competition with SMR operators.

The Commission has been treated to Nextel's claims that its service will be so superior to traditional SMR operations that it is entitled to regulatory parity with Cellular and/or PCS operations. However, Nextel's request for parity is belied by its very comments. Nextel is unable to demonstrate that spectrum reallocation to provide the primary services Cellular and PCS, were required.³ Rather, Nextel's claimed competitors received use of radio spectrum following rule making to make separate allocation of spectrum. Spruill respectfully suggests that Nextel's quest for parity begin with its filing a request for rule making to establish its own allocation, thereby providing a full opportunity for comment before the Commission.

Nextel's footnote 12 states that "coupled with long term cellular customer contracts and permissive bundling regulations, the Commission would be undercutting its competitive marketplace goal for the wireless industry if it fails to make these regulatory changes for ESMR licensees." Nextel's comments are without merit as they might be used to support its request. Cellular carriers' success in the creation of long

³ Nextel's attempt to compare its request to PCS's intended use of the 2 GHz band is specious. Displacement of point-to-point microwave systems does not require the cost, time or licensing fiasco suggested by Nextel. Nor will such reallocation unduly disturb operations by subscribers to these systems, who will not be forced to participate.

term contracts and employment of permissive bundling are a result of business and marketing strategy moreover than regulation. Nextel's request for parity, therefore, places Nextel outside of the halls of the Commission and smack into the marketplace to copy or improve on the business strategies employed by successful Cellular carriers if Nextel so desires. The competitive wireless industry, which Nextel claims to be in some unsupported form of jeopardy, exists, with or without the introduction of Nextel's ESMR systems to the market. One needs only to list the alternatives present to any member of the public in search of two-way service, and it is quickly apparent that ESMR is just one more alternative among many competing services, all of which appear to be doing quite nicely, except Nextel's.

The Law Does Not Compel The Relief Which Nextel Requests

There is no requirement, whatsoever, that the Commission revise its licensing procedures or frequency allocations to make ESMR regulation more like Cellular regulation, or vice-versa. Section 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993 provides that the Commission shall make such revisions and terminations in its regulations "as may be necessary and practical to assure that licensees in [of CMRS stations in the Private Radio Service] are subjected to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." Nextel has not demonstrated that the services which it, in fact, provides as an ESMR operator are substantially similar to the services provided by Cellular operators. Even were the Commission to determine that Nextel's ESMR service is

substantially similar to the service of DPCRTS operators, that would not mean that the Commission was required to reallocate frequencies solely to ESMR use. The Commission could provide full technical regulatory parity between ESMRs and Cellular operators by expanding the bandwidth of ESMR systems to match that of Cellular systems and requiring an ESMR operator to pay adjacent channel licensees for the adjusted technical bandwidth upon which the ESMR system encroached.

The threat to the Commission's processes arising out of a finding that Nextel's service is entitled to its requested treatment is that the Commission might be inundated with "me too" demands from all manner of carriers. Digital paging companies might seek reallocation of spectrum, with exclusivity in major markets through stacking of channels to provide wide-band high-speed data communications. SMR operators which employ digital technology would be entitled to equal treatment, whether their systems were deemed "wide area" or not. In sum, the Commission would be compelled to throw open its doors to each such request as operators each make an argument that their service is or will be substantially similar to Cellular operations. The Commission's resources are sufficiently burdened at present, without the need to redefine and accommodate each service based on whether it now employs digital or analog transmissions.

Nextel's Request Is Clearly Anti-Competitive In Origin And Nature

Nextel failed to explain to the Commission that there is no way in which Nextel could possibly change the frequencies of all existing SMR systems in the band above 861 MHz (the "old frequencies") and also fulfill the Commission's objective of preserving "for existing licensees in Fleet Call's markets both the protection from interference guaranteed them by our rules and the flexibility they too require to operate competitively and effectively," MO&O at para. 13. Nextel suggested that the Commission reallocate the 200 old frequencies to ESMR use, and that it allow ESMR operators to change the operating frequencies of existing SMR systems to frequencies other than the old frequencies. What Nextel failed to point out, however, is that such a move would preclude existing licensees in that band from using those frequencies to become ESMRs themselves, thereby impairing existing licensees' flexibility to operate competitively and effectively. What Nextel wants, clearly, is to use its ESMR authorization as a weapon to preclude existing licensees from exercising the flexibility to compete with it in the ESMR field.

Nextel would divest each existing licensee of its old frequencies, and then would have the Commission determine that since the existing licensee did not have an ESMR application on file on or before August 10, 1994, the displaced licensee would be forever precluded from using its currently authorized old frequencies for ESMR operation. See, Nextel comments at 16-17. At the same time that Nextel suggested that "it is highly doubtful that any market can economically support more than one ESMR,

particularly given the onset of digital cellular, the creation of PCS and the coming implementation of satellite-based wireless telecommunications systems," Nextel comments at 16, Nextel would have the Commission take steps to assure that Nextel did not have to suffer ESMR competition from existing licensees of the old frequencies. Such blatant efforts to use the Commission's processes for anti-competitive ends should not be countenanced by the Commission.

As Nextel pointed out at footnote 30 of its comments, the Commission "has found that the cellular market is not competitive at this time." As the Commission will recall, it took several years for the Commission to move from its initial proposal that there be only one Cellular licensee in each market and that the licensee would be the local wireline telephone company, to a recognition that competition required at least two competitors. Nearly a decade passed between the Commission's initial proposal for Cellular systems and the licensing of the first system. After a decade of Cellular service, the Commission has come to recognize that two competitors are not enough in advanced technical systems to provide a competitive marketplace. Based on its experience in the Cellular field, the Commission should find that if the public is to have any potential for enjoying the benefits of ESMR operation, then the Commission needs to assure that there will be the potential for at least three ESMR systems in each market. Accordingly, were the Commission to adopt Fleet Call's suggestion, it should place a cap on the maximum number of old frequencies which will be licensed to any

ESMR operator at 66 (one-third of the 200 old frequencies).⁴ As the Commission has recognized in its Notice of Proposed Rule Making in PR Docket No. 93-144, _____ FCC Rd. _____ (FCC 93-257 Released June 3, 1993), a minimum of 42 frequencies is required to construct a wide area system. Providing each of three ESMR operators in a market with 66 frequencies should be more than sufficient for each to construct and operate a system.

As demonstrated above, Nextel's obvious scheme is to provide for itself a dominant position within the SMR industry is possible given the natural consequences of its proposal. There are presently analog SMR operators which either have the necessary authorized channels to develop an ESMR system or which, in combination with other operators, could obtain the necessary spectrum. These operators must not be precluded or deterred from competing in this area so that Nextel may improve its chances at gaining a monopoly position in its chosen markets. Such a unhealthy competitive environment is exactly the kind of threat to a competitive wireless industry which Nextel claims exists *sans* grant of its proposal.

The Commission has always promoted the ability of small businesses to achieve greater economic success through innovation and expansion. Although the original grant of the Nextel waiver has deterred much of the growth of small businesses by

⁴ The first ESMR licensee in a market would be entitled to the odd, 67th channel.

making unavailable necessary spectrum for continued growth, many of these businesses have continued to persevere. Nothing to be done in response to Nextel's proposal should preclude the healthy expansion of diligent businesses within the marketplace.

The Cost Would Not Be In The Public Interest

The costs of changing the frequencies of existing SMR stations would far exceed the simplistic treatment which Nextel afforded to the process. Some older mobile units not capable of changing from old frequencies to frequencies outside of the old frequency band, and the ESMR operator would have to be willing to replace each of those mobile units. Even where the frequency of equipment can be changed, the burden on SMR operators and their customers would be far more extensive than Nextel implied.

Only the Motorola brand trunking system allows mobile unit frequencies to be changed without requiring the mobile unit to have the "hands-on" attention of a radio technician. In some instances, each end user mobile unit must be removed from a customer vehicle and disassembled, and the frequency determining elements removed and exchanged for different elements. The new frequency determining elements, whether they be programmable read-only memory circuits or crystal oscillator components, must be manufactured specifically for each operating frequency. In other instances, the mobile unit can be programmed by the use of a special computer device. In any event, except for Motorola brand units, each customer mobile unit must be

brought into the SMR operator's shop for the frequencies to be changed. As the Commission's records reflect, the effort would involve the disruption of the business affairs of tens of thousands of SMR customers, at a cost of hundreds of thousands of worker hours, to allow Nextel to change the frequencies of more than one million SMR end user units to other frequencies.

The loss of productive working time to the traditional SMR end user customers would be staggering and the cost in terms of money would be incalculable. The extreme cost to American businesses which rely on their SMR service is obvious, but Nextel did not suggest how it would compensate the end users for the disruption of their business activities to accommodate Nextel.

There are many other costs to be borne by uncompensated operators if Nextel's proposal were to become regulation, including without limitation the cost of renegotiating site leases, which are often frequency specific; the cost of identifying and resolving intermodulation problems arising out of changes in frequencies; the cost of renegotiating contracts for management services and/or sale of systems, particularly when the buyer relied on the availability of particular frequencies; and the cost of preparing and filing a mountain of applications and associated documents with the Commission to accommodate the frequency exchange.

Spruill respectfully suggests that the cost of implementing Nextel's proposals would be beyond the scope of reasonable calculation and would be borne almost exclusively by parties which would derive no benefit whatsoever from the payment of such costs, and by the Commission which clearly cannot afford such costs.

The Matter Is Not Ripe

This matter is not ripe for consideration. Nextel has lofted a request for a major frequency reallocation in the midst of an unrelated rule making proceeding. A suggestion of the magnitude of Nextel's requires that the Commission 1) consider whether the suggestion justifies the initiation of a rule making proceeding, and, if it determines that the suggestion should be seriously considered, 2) give the public full notice of the proposal in the Federal Register, and 3) give the public a full opportunity to file initial comments and reply comments.

Given the nature of Nextel's comments, which would not appear to be within the scope of this proceeding, the Commission must treat Nextel's comments as a court might treat a motion for summary judgment. That is, the Commission should view Nextel's comments as requiring a showing that no dispute exists regarding a material issue of fact between opposing parties and that, if no such dispute is found, the record demonstrates that Nextel's request is in the public interest. This method of review is fair and appropriate under the circumstances. Application of this accepted standard

demonstrates clearly that Nextel is not entitled to the relief it seeks and that its proposals must, within the context of this proceeding, fail.

There is no urgency to Nextel's request. Not until August 10, 1996, would any ESMR operator become a Commercial Mobile Radio Service provider entitled to regulatory parity with any common carrier service, *see*, Section 6002(c)(2)(B) of the Omnibus Budget Reconciliation Act of 1993. Therefore, plenty of time remains for the Commission to conduct notice and comment rule making in full accord with the Administrative Procedure Act before any ESMR operator becomes entitled to regulatory parity with any other CMRS operator.

The public interest would be well served by deliberateness, rather than speed, in the instant matter. Nextel has until March 14, 1996, to complete construction of its ESMR system. Between that time and August 10, 1996, the Commission can assess the state of Nextel's progress and, based on the facts as they exist at that time, determine whether any amendments to the Commission's Rules are warranted. Since there is ample time for the Commission to determine whether Nextel will succeed in reaching its initial benchmark, and therefore whether any further support of Nextel is justified, the public interest will be best served by the Commission's deferring any action on Nextel's suggestion until after March 14, 1996.


Section 6002(d)(3)(B) of the Budget Act provides that the Commission shall make appropriate modifications or terminations "in the regulations that will . . . apply to a service that was a private land mobile service and that becomes a commercial mobile service." (emphasis added) The import of the use of the word "becomes" in Section 6002(d)(3)(B) of the Budget Act is that until such time as Nextel actually becomes a CMRS operator, on August 10, 1996, the Commission has no authority to take any steps to grant any of the relief requested by Nextel. The Commission has no authority under Section 6002(d)(3)(B) to adversely affect the authority which it has granted to existing, traditional SMR operators for the purpose of favoring Nextel until August 10, 1996, at which time, if it still exists, Nextel becomes a CMRS operator.

Conclusion

For all the foregoing reasons, C.T. Spruill respectfully requests that the Commission dismiss or deny the suggestion offered by Nextel's comments.

Respectfully submitted,
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Dated: July 11, 1994

CERTIFICATE OF SERVICE

I, Nakia M. Marks, hereby certify that on this 11th day of July, 1994, I caused a copy of the attached Reply Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

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